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No. 1030 41

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

SCOPHONY CORPORATION OF AMERICA, GENERAL PRECISION EQUIPMENT CORPORATION, TELEVISION PRODUCTIONS, INC., PARAMOUNT PICTURES, INC., SCOPHONY LIMITED, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

Civil Action No. 34–184

UNITED STATES OF AMERICA, PLAINTIFF

v.

SCOPHONY CORPORATION OF AMERICA, SCOPHONY LIMITED, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause in favor of defendant Scophony, Limited, on November 8, 1946. A petition for appeal is presented to the District Court herewith, to wit, on January 6, 1947.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. sec. 29),

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and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C., sec. 345).

The judgment dismissing the complaint as to Scophony, Limited, is the "final decree" of the District Court as to this defendant.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173.

Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502, 505, 508.

STATUTE INVOLVED

Section 12 of the Act of October 15, 1914, 38 Stat. 736, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

THE ISSUES AND THE RULING BELOW

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act charging the defendants with conspiring to restrain and monopolize interstate and foreign commerce in

products, processes, patents and inventions useful in television and allied industries. The defendants named in the complaint are Scophony Corporation of America (referred to herein as SCA); Scophony, Limited (referred to herein as Limited); General Precision Equipment Corporation (referred to herein as General); Paramount Pictures, Inc.; Television Productions, Inc. (referred to herein as Productions), a wholly-owned subsidiary of Paramount Pictures, Inc.; Arthur Levey, a director of Limited and one of its representatives in the United States; and two other individual defendants. Limited is a British corporation and the other corporate defendants are American corporations.

Service of process as to Limited was made by delivering to Arthur Levey in New York City a copy of the complaint and a summons directed to Limited. A copy of the complaint and a like summons was also served in New York City upon William George Elcock, who was financial comptroller and a director of Limited. At the time of said service Levey was a resident of New York City and Elcock was traveling in this country in connection, in part, with the interests of Limited.

Following such service Limited appeared specially and moved (1) to dismiss the action as to it upon the ground that the court lacked jurisdiction to entertain a suit against it and (2) to quash the purported service of process on it upon the ground

that the service was insufficient to vest the court with jurisdiction over this defendant. Upon the basis of the facts set forth in affidavits filed by the opposing parties, the district court on October 30, 1946, filed an opinion holding that the activities of Limited within the Southern District of New York were not such as to warrant the conclusion that it had subjected itself to the local jurisdiction. On November 8, 1946, the court entered a judgment dismissing the complaint as to Limited and quashing service of process as to it.

The facts before the district court on Limited's motions may be summarized as follows:

Limited is the owner and licensor of inventions purporting to cover television reception and transmission systems. It was manufacturing and marketing in England certain commercial television sets prior to the outbreak of war with Germany in 1939, but these activities terminated with the outbreak of war. In 1940 Limited sent some of its personnel and equipment to this country and during 1940, 1941 and part of 1942 it maintained an office in New York City and engaged in various activities incident to placing its product on the American market. The district court was of the opinion that the character of Limited's business here during this period would well warrant the inference that it had subjected itself to the local jurisdiction and that it was present here by agents upon whom service of process could be made.

Limited found itself handicapped in promoting an American market for its inventions by a shortage of funds and of proper equipment. Accordingly, in July and August of 1942 it entered into agreements with Productions and General pursuant to which a new corporation, SCA, was formed. Limited transferred to SCA all of its equipment and television patents in the United States and received in exchange approximately two-thirds of SCA's class "A" common stock, which stock was entitled to elect three-fifths of SCA's board of directors and its president, vice-president and treasurer. Productions and General purchased for cash all of SCA's class "B" common stock, which controlled the election of the remaining directors and officers of SCA. Productions and General were also granted exclusive licenses under all of SCA's patents. They agreed to pay royalties to SCA on the products produced under these licenses and SCA agreed to transmit 50% of such royalties to Limited.

The agreements provided that Limited would not market any product covered by its inventions in the Western Hemisphere and that Productions and General would not market any such product outside the Western Hemisphere. The agreements also provided for a continuous interchange of patent information between Limited and SCA.

Arthur Levey, who was the prime negotiator for Limited in working out the agreements, be-

came president and a director of SCA. Since SCA's exclusive licensees have not as yet manufactured and sold any products covered by their licenses, SCA has received no royalty income from them other than a stipulated minimum royalty payment. Since the spring of 1943 Levey has sought to obtain for SCA the right to manufacture under its patents or to license other parties thereunder but the "B" directors representing Productions and General have been unwilling to approve such action. In the controversy with the "B" directors Levey was acting on behalf of both SCA and Limited and Limited had authorized him to represent it in negotiating with the two exclusive licensees and with other parties in the United States who might be interested in exploiting the inventions of the SCA patents. Limited also authorized certain other parties to investigate these problems and to assist Levey in his negotiations.

There has been a continuous interchange of information between Limited and SCA relating to patent situations and developments in the United States affecting their inventions. In certain instances SCA has, at the request of Limited, purchased for it certain materials and equipment in the United States and has arranged for shipping them to England.

The district court was of the opinion that although Limited had "major control" over SCA,

the latter had not been an agent carrying on the ordinary business of Limited. The court was also of the opinion that the individuals, particularly Levey, who had represented Limited in the United States, had been engaged in protecting its interest in SCA, with reference to matters which concerned the conduct of the business of SCA and not that of Limited. The court therefore concluded that Limited was not "found" within the local jurisdiction, within the meaning of Section 12 of the Clayton Act, by reason of the acts of SCA or by reason of the activities within the United States of Levey and other individual agents of Limited. The court also held that Section 12 of the Clayton Act has the same application to an alien corporation as to a domestic corporation not resident in the district in which process is served.

THE QUESTIONS ARE SUBSTANTIAL

The appeal presents the question whether Section 12 of the Clayton Act applies to an alien corporation. This question has not heretofore been before this Court and is substantial. Since domestic corporations necessarily can be sued and served with process somewhere in the United States, the effect of Section 12 in respect of such corporations is to facilitate subjecting them to suit and to clarify the question of proper venue and adequate service of process. But an alien corporation is not an "inhabitant" of the United

States and is not necessarily "found" within any judicial district. Accordingly if Section 12 applies to alien corporations and imposes any limitations beyond those of procedural due process, the section in its application to alien corporations is narrowing rather than broadening and it is to be doubted that Congress intended any such result. An additional reason for regarding Section 12 as limited to domestic corporations is that alien corporations, which are not inhabitants of any judcial district, are not within the provisions of the section authorizing suit and service of process in the district of which the corporation is an "inhabitant." Furthermore, if Section 12 applies at all to alien corporations, the appeal presents the question whether the section is to be interpreted in respect of such corporations as setting forth merely the requirements of procedural due process. See *International Shoe Co.* v. *State of Washington*, 326 U. S. 310.

If this Court should hold that Section 12 has the same application to an alien corporation as to a nonresident domestic corporation, the appeal presents a further question of substance. This question is whether an alien corporation is "found" within the judicial district within the meaning of that section when it utilizes a subsidiary to carry on business in the United States; derives profits, from the business of this subsidiary; participates, through agents in the man-

agement and control of this subidiary; and utilize the subsidiary as a medium for establishing cartel agreements which are in restraint of the interstate and foreign commerce of the United States and which violate the Sherman Act.

The above question is similar to that which is presented in numerous pending proceedings brought by the United States under the Sherman Act questioning the legality of cartel agreements entered into between domestic and alien corporations. In the instant case, as in other like cases, full and effective relief, in the event that the cartel agreements are found to be illegal, cannot be granted unless the defendant alien corporation or corporations can be subjected to the local jurisdiction.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 6, 1947.

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United States District Court, Southern District of New York

Civ. 34–184

UNITED STATES OF AMERICA, PLAINTIFF

v.

SCOPHONY CORPORATION OF AMERICA, SCOPHONY LIMITED: ET AL., DEFENDANTS

Appearances: Edwin Foster Blair, Esquire, Attorney for Defendant Scophony, Limited, Appearing specially; Joseph B. Marker, Esquire, Special Attorney, Attorney for United States of America; Simpson, Thacher & Bartlett, Esquires, Attorneys for Defendants Television Production, Inc., Paramount Pictures, and Paul Raibourn; Mudge, Stern, Williams & Tucker, Esquires, Attorneys for Defendants Earl G. Hines and General Precision Equipment Corporation; Joseph O. Ollier, Esquire, Attorney for Defendants Arthur Levey and Scophony Corporation of America.

EDWARD A. CONGER, *U. S. D. J.*:

The Defendant, Scophony, Limited, moves to quash service of process and dismiss the complaint herein upon the ground that it is a corporation organized under the laws of Great Britain, not subject to the jurisdiction of this Court.

The action is brought pursuant to Section 4 of the Sherman Anti-Trust Act (15 U. S. C. A. § 4) against five corporate defendants, including the

movant, and three individuals to restrain continuing violations of Sections 1 and 2 of the Act (15 U. S. C. A. § 1 and § 2). The complaint charges the defendants with combining and conspiring to monopolize and restrain interstate and foreign trade in products, processes, patents and inventions useful in television and allied industries.

Service of process was effected in New York City on December 20, 1945 by leaving a copy of the summons and complaint with defendant Arthur Levey, who is a Director of Scophony, Limited. On April 5, 1946 one W. G. Elcock, also a Director of Scophony, Limited, was served while visiting this country.

Section 12 of the Clayton Act (15 U. S. C. A. § 22), pursuant to which venue is established and jurisdiction acquired in suits of this type, provides as follows:

> Any suit, action, or proceeding under the anti-trust laws agains a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; *and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.* [Italics added.]

It may be noted that the emphasized portion of the section relating to jurisdiction is concerned here; and the main problem is, therefore, whether the defendant, Scophony, Limited, not being an "inhabitant" of this district, is "found" here.

Although there have been numerous decisions rendered in application of this section, the great majority of them relate to domestic corporations (corporations organized within the United States) rather than alien corporations, as here.

Recently, Judge Leibell of this Court considered the instant problem in a suit analogous to the present one (*U. S.* v. *U. S. Alkali Export Association, et al.*, decided July 16, 1946), and he held that a British corporation which owned the entire capital stock of an American corporation functioning within the jurisdiction of this Court was "found" here within the meaning of Section 12. He concluded that the activities of the American corporation on behalf of the parent company warranted the finding that the former was merely an "agency subsidiary" of the British company.

In general, a corporation is "found" within a given jurisdiction if it there does business "of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *U. S.* v. *Aluminum Co. of America* (D. C. N. Y., 1937), 20 Fed. Supp. 13; *Haskell* v. *Aluminum Co. of America* (D. C. Mass., 1926), 14 Fed. (2d) 864. An examination of the cases indicates that the concept expressed as "found" is identical with the more familiar "doing business."

The affidavit submitted by the Government in opposition to this motion contains a detailed statement of the various activities of movant in this jurisdiction. Much of this activity occurred prior to the signing of the so-called "basic agreements" with the other defendants in 1942.

Defendant Scophony, Limited (hereinafter referred to as "Limited") has its office in the City of London, England. It is in the business of manufacturing and selling television apparatus and is the owner and licensor of inventions purporting to cover, among other things, television reception and transmission systems.

In the Spring of 1939, Limited manufactured and placed on the market in England several commercial television sets. After the outbreak of the war with Germany in September 1939, the British Broadcasting Corporation stopped the television broadcasts.

In 1940, Limited sent some of its personnel and various television equipment to this country; it maintained an office in New York City from 1940 to 1941; it demonstrated its product here; it leased one of its television sets to a theatre company as a result of which a set was installed in the Rialto Theatre in New York City. In general, Limited was actively engaged in placing its product in the American market, inasmuch as the English market was closed to it because of the war. In those early years, 1940 and 1941, and perhaps for part of 1942, Limited's business here was of

such a character that one might very well infer that it had subjected itself to the local jurisdiction and was present here at that time by its duly authorized agents upon whom service of process could be made.

Unless there was a continuity of such activities down to the present, however, such course of conduct is of no aid in the determination of this motion. What we are interested in is the business conduct of this defendant in this jurisdiction at the time process in this action was served upon it or within a reasonable time before that.

There is no question but that these business activities which I have referred to ceased prior to the time this defendant entered into the "basic agreements."

These agreements were executed on July 31, 1942, and August 11, 1942. In substance, they provided for the creation of a new corporation, the Scophony Corporation of America (hereinafter called "SCA"), to which Limited sold all its equipment within the United States, and all its present and future patents. SCA, in turn, gave exclusive licenses for the manufacture and sale of products under the Scophony inventions in the Western Hemisphere to defendants General Precision Corporation and Television Products, Inc. The exclusive licensees agreed to pay royalties to SCA on all products that they might produce under the Scophony inventions, and SCA agreed to transmit to

Limited fifty percent of all royalties that it received from the licensees.

The capital structure of the new corporation, SCA, was to consist of 1,000 "A" shares and 1,000 "B" shares. The "B" shares were allotted to the American interests, General Precision Equipment Corporation and Television Productions, Inc., a wholly-owned subsidiary of Paramount Pictures, Inc. The "A" shares were allotted to the British interests, principally Limited.

The "A" shares are entitled to elect three-fifths of the Board of Directors of SCA and to elect the President, Vice President, and Treasurer of the new corporation. Since the creation of SCA the representatives of the "A" shares have been elected by Limited.

The "B" shares are entitled to elect two-fifths of the Board of Directors of SCA and also the Secretary and Assistant Secretary.

The Government contends that these agreements provide for the division of world markets in the products covered by the Scophony inventions, particularly those relating to television. Limited retained the Eastern Hemisphere, including England, as its exclusive territory for the manufacture and sale of products covered by Scophony inventions.

The Western Hemisphere, including the United States, became the exclusive territory of SCA or its two exclusive licensees for the manufacture and sale of products under the Scophony inventions.

It is apparent from these provisions that Limited exerted the major control over SCA. Defendant Levy, who is President and a Director of the American Corporation is also a Director of Limited.

However, it is well settled that a parent corporation does not "do business" in a given jurisdiction merely because of the presence there of its subsidiary without some further factual basis for concluding that the parent has injected itself into the jurisdiction by its conduct in relation to the subsidiary, or that the subsidiary is acting solely as an agent, as was the situation in *U. S.* v. *U. S. Alkali, supra. Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 330; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85; *Amtorg Trading Corp.* v. *Standard Oil Co. of Cal.* (D. C., N. Y. 1942), 47 Fed. Supp. 466; *American Fire Prevention Bureau* v. *Automatic Sprinkler Co. of America* (D. C. N. Y. 1941), 42 Fed. Supp. 220. And there is no evidence, except possibly for the fact that Limited received fifty percent of the royalties earned by SCA, that SCA stood any differently than any ordinary subsidiary corporation, nor is there any indication that it acted merely as an agent for Limited. It is true that SCA did act for Limited in the purchase of certain materials and equipment in the United States, but it appears from the papers that this occurred on occasion, and not as frequent and common practice of SCA.

The Government asserts that Limited is "found" here by reason of the activities of its agents, especially Levey, and others.

Levey was the prime negotiator for Limited of the "basic agreements" to which the Government has directed its attack. He consulted with Limited with respect to the proposed modifications of the "A" stock allocations, and which proposal resulted in the new allocations set forth in the agreement of February 4, 1943, whereby Limited received two-thirds of the "A" shares. He kept Limited advised about the negotiations with regard to the employment by SCA of an inventor, Dr. Rosenthal. He carried out instructions and kept Limited advised in connection with the disputes which subsequently ensued between the "A" and "B" Directors. In order to assist him in resolving these difficulties, Limited gave him a power of attorney, dated March 26, 1945, authorizing him to vote Limited's shares in SCA.

Numerous others were authorized by Limited to act in its behalf in these disputes, including W. G. Elcock, who travelled to this Country for the purpose, James L. Fly and John Sloan, attorneys, Robert Boothby, a British member of Parliament and Commander Arthur Mallet, an English officer.

While a successful settlement of these disputes might inure to the benefit of Limited, still the disputes were concerned with the conduct of the business of SCA and not that of Limited.

Assuming the truth of the allegations in the complaint with respect to Limited's business, i. e. that it is engaged in the manufacturing, selling and licensing of television apparatus, it would seem that none of the activities of Limited's agents were concerned with the ordinary business of Limited. These agents were engaged in protecting the interests of their principal in SCA.

The Government finally argues that the conduct required to hold an alien corporation under Section 12 may vary from that required to hold a foreign corporation. If by this the Government means that there is one rule which applies to alien corporations and another to foreign corporations it is clearly in error. The cases cited by the Government do not support this theory. All of them where pertinent apply the rule as I have heretofore stated it, and make no such distinction, nor do any of the other cases which I have read.

I am not unmindful of the effect of my holding here. However, that cannot determine my judgment. I cannot make the rule to fit the case. I can only apply the rule to the facts and having done so announce the result.

This I have done, and although the result may be unfortunate as far as the Government in concerned, I can only conclude that Limited was not found within the jurisdiction of this Court at the time of service of process, and the motion to

quash the service and dismiss the complaint must be granted.

Submit order on notice.

Dated: October 30, 1946.

EDWARD A. CONGER,
United States District Judge.

Civ. 34–184. United States District Court, Southern District of New York. United States of America, Plaintiff, v. Scophony Corporation of America: Scophony, Limited, et al., Defendants. Opinion. Edward A. Conger, D. J. U. S. District Court, S. D. of N. Y. Filed Oct. 30, 1946, 12:20 P. M.

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